Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

Andres Alonso, Jr.,

Petitioner,

v.

Grand National Bank,
Arrow Precision Products, Inc.,
and Academy Manufacturing,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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In Propria Persona

8/Pb

QUESTIONS PRESENTED

Petitioner, an attorney, advised his clients that a subpoena for their deposition in a bankruptcy proceeding was invalid. The bankruptcy judge, displeased with the advise, held petitioner in contempt and ordered him to "produce" his clients, who were not present, for the deposition. Under the threat of contempt, petitioner acquiesced to a deposition date, but his clients, who were never properly served with notice, did not appear on that date. The District Court found petitioner guilty of criminal and civil contempt for not producing his clients, and, in addition to civil penalties, sentenced petitioner to prison and placed him on probation. The clients later submitted to the deposition and were exonerated of any contempt charges. Inexplicably, the Ninth Circuit Court of

Appeals affirmed petitioner's criminal and civil Contempt convictions on the sole ground that he purportedly "represented to a bankruptcy court that he would produce his clients for deposition, when he had no intention to do so."

The case presents novel and important issues regarding statutory and constitutional limits on the contempt power of federal courts and the right of any court to conscript an attorney to carry out court orders against his own clients:

1. Is an attorney denied due process of law when he is deprived of his own liberty and property for failing to do what an attorney cannot physically, legally or ethically do -- "produce" his clients for deposition?

2. Does an attorney "obstruct the administration of justice" within the meaning of the federal contempt statute,

Title 18, U.S.C., Section 401, by acquiescing, (after being held in contempt), to a depositon date for his clients who, as it later develops, are not, and never were, legally bound to appear at that deposition?

3. In the fair administration of federal justice, should an attorney ever be punished as a <u>criminal</u> for honestly and correctly advising his clients of their legal rights?

PARTIES TO THE PROCEEDINGS IN LOWER COURTS

Debtor:

Akros Installations, Inc.,
a California corporation

Creditors and Appellees:

Grand National Bank,
Arrow Precision Products, Inc.,
and Academy Manufacturing

Appellants:

Fred Alexander, Linda Alexander,
and Andres Alonso, Jr.

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Petitioner, ANDRES ALONSO, JR., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unreported Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is reprinted as Appendix A to this Petition. The unreported Order of the United States District Court for the Central District of California convicting petitioner of criminal and civil contempt is reprinted as Appendix B to this Petition. The unreported Order of the United States District Court for the Central District of California partially vacating the conviction and correcting illegal sentence is reprinted as Appendix C to this Petition.

The "Certification to District Court (Bankruptcy Rule 9020(a)(3)); Report and Recommendation of Bankruptcy Judge Re: Contempt" is reprinted as Appendix D to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1986. The jurisdiction of this court is invoked under Title 28, U.S.C., Section 1254(1).

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person . . . shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

Title 18, U.S.C., Section 401,

provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
>
> "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> "(2) Misbehavior of any of its officers in their official transactions;
>
> "(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

Rule 7-101 of the Rules of Professional Conduct of the State Bar of California

provides:

> "A member of the State Bar shall not advise the violation of any law or ruling of a tribunal unless he believes in good faith that such law, rule or ruling is invalid. A member of the State Bar may take appropriate steps in good faith to test the validity of any law, rule of a tribunal."

STATEMENT OF THE CASE

A. Background.

This is a criminal and civil contempt proceeding against an attorney, petitioner, ANDRES ALONSO, JR. The underlying action involves the bankruptcy of Akros Installations, Inc., a California corporation ("Akros"), instigated by Grand National Bank, Arrow Precision Products, Inc., and Academy Manufacturing ("Creditors"). (E.R. 2.[1/]) Creditors attempted to serve petitioner's clients, Fred Alexander and Linda Alexander, with subpoenas for their deposition and for production of documents. (E.R. 69-70.) Because of fatal deficiencies in service of the bankruptcy petition and the resulting invalidity of the subpoenas,

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1/ "E.R. 2." refers to Page 2 of the Appellant's Excerpts of Clerk's Record filed in the Court of Appeals. The excerpts are paginated consecutively.

and on the advice of petitioner, the Alexanders refused to comply with the subpoenas. The bankruptcy judge, the District Court, and the Ninth Circuit Court of Appeals each reached different conclusions why petitioner should be held in contempt for his and his clients' conduct.

B. The Bankruptcy Court's Contempt Finding Against Petitioner for Advising his Clients of their Rights.

Creditors filed a motion for an order for contempt and sanctions against the Alexanders and petitioner. (E.R. 72.) At the hearing on the motion, petitioner contended the subpoenas for his clients' deposition were invalid because, contrary to law, the case had not been properly commenced by adequate service of the defendant Akros with the bankruptcy petition, and because, contrary to law, no notice

of the depositions had been given to Akros when Akros was later properly served. (E.R. 45-50.[2/])

2/ Petitioner's legal argument was correct: The subpoenas for the deposition of his clients were invalid. As the bankruptcy court had earlier ruled (E.R. 33-35.), the defendant in the bankruptcy action, Akros, had not been properly served with the bankruptcy petition. There was no personal service within the time prescribed by the rules, and attempted service by mail had been unsuccessful. Where the plaintiff has not properly initiated the case by bringing the defendant within the jurisdiction of the court by service of process, the plaintiff is not permitted to engage in discovery against prospective witnesses. (Application of Royal Bank of Canada, 33 F.R.D. 296 (S.D. N.Y. 1963).) "[A] plaintiff should not be permitted to use the federal rules' discovery procedures until, and unless, the prospective party has been subjected to the jurisdiction of the court via service of process." (33 F.R.D. at 302.)

Further, written notice to the opposing party is a prerequisite to the issuance of a valid subpoena. (Srybnik v. Epstein, 13 F.R.D. 248, 249 (S.D. N.Y. 1952).) Therefore, the failure of a party to serve upon the opposing party a written notice of taking a deposition of a non-party invalidates any subpoena which has been issued by the clerk without proper proof of notice of taking of the deposition. The creditors in this case did not and could not have given valid notice of taking of the depositions of the attorney's

The following excerpt from the hearing is presented in full because it constitutes the entire basis upon which petitioner was later held in criminal and civil contempt: (E.R. 49:17 to 52:21.)

> "THE COURT: The court finds -- let me give you a chance to expunge the contempt. Are you going to produce Mr. and Mrs. Alexander for depositions?
>
> "MR. ALONSO: If Your Honor is stating that you have issued an order, I want the record to be very clear. Is Your Honor stating that you have authority to order a subpoena against non-party litigants before the actual debtor or alleged debtor is served with the involuntary petition of bankruptcy?
>
> "THE COURT: Yes, sir.
>
> "MR. ALONSO: Is that what the court is stating?
>
> "THE COURT: Yes, sir.
>
> "MR. ALONSO: Okay, we take exception to that.

---

clients since the defendant in the action, Akros, had never been served, as of the time that the clients were served with the subpoenas to appear for the taking of their depositions.

"THE COURT: I am sure you do.

"MR. ALONSO: And of course we will file an appeal, you know, of your ruling.

"THE COURT: You may file whatever you want. What I am saying is, are going to produce the Alexanders for deposition?

"MR. ALONSO: Mr. and Mrs. Alexander were following my legal advice and the legal advice of my associate in my law firm. When we looked at the law we thought that the case law was clearly in our favor, that since the court was acting under a misapprehension --

"THE COURT: Let's focus on the big question. Are you going to produce the Alexanders?

"MR. ALONSO: Am I going to produce the Alexanders?

"THE COURT: That is right, for deposition.

"MR. ALONSON [sic]: If, after we exhaust our appellate remedies --

"THE COURT: So the answer is no.

"MR. ALONSO: The answer is yes, we will produce Mr. and Mrs. Alexander after we have exhausted our appellate remedies.

"THE COURT: So you are not going to produce them now.

"MR. ALONSO: Not today.

"THE COURT" When are you going to produce them?

"MR. ALONSO: When we exhaust our appellate remedies.

"THE COURT: You are not going to produce them

"MR. ALONSO: No, until the court rules that Your Honor is correct and we are wrong.

"THE COURT: Okay.

"MR. ALONSO: And if you are going to hold them in contempt, than I am going to request that Your Honor grant a stay pending the appellate process carrying out its ultimate conclusion.

"THE COURT: The motion for contempt and sanctions against Mr. and Mrs. Alexander and Mr. Alonso is granted. They are cited --

"MR. ALONSO: Excuse me, against Mr. Alonso?

"THE COURT: Yes, sir, you are not producing your people.

"MR. ALONSO: I have never been served with any order to appear for

any deposition.

"THE COURT: Sir, I just heard you say that your clients did you [sic] appear because of your legal advice.

"MR. ALONSO: Yes.

"THE COURT: I am citing you for contempt also.

"MR. ALONSO: But you did not serve me with any order.

"THE COURT: You are now served with an order, sir, to produce your clients for deposition forthwith to Mr. Palmer at his office for deposition.

"MR. ALONSO: When you say forthwith, what does that mean?

"THE COURT: When do you want to schedule it, Mr. Palmer?

"MR. PALMER: I would suggest the week after next.

"THE COURT: Is that convenient for your calendar, Mr. Alonso, and to your clients?

"MR. ALONSO: What date did he say?

"THE COURT: You give me a convenient date, Mr. Alonso, in December or in November if that is more convenient for you.

"MR. ALONSO: No. December 11th, Your Honor.

"THE COURT: Is that convenient to you, Mr. Palmer?

"MR. PALMER: That is acceptable, Your Honor at 10:00 o'clock?

"THE COURT: 10:00 o'clock; is that convenient, Mr. Alonso?

"MR. ALONSO: 10:00 o'clock would be fine, Your Honor.

"THE COURT: And you will give him a card for your office location, Mr. Palmer?

"MR. PALMER: Yes, I will send him notice.

"THE COURT: I am going to hold the motion for contempt and sanctions, then, off calendar and treat is as expunged if you produce your clients for deposition, Mr. Alonso. The motion to dismiss involuntary petition is denied. The depositions are reset at December 11, 1984 at the ofice of Mr. Palmer at 10:00 a.m."

C. The District Court's Contempt Finding against Petitioner for his Failure to "Produce" his Clients.

The Alexanders did not appear for the deposition, and the bankruptcy court heard a new motion for contempt and sanctions against the Alexanders and petitioner. (E.R. 4.) The matter was certified to the District Court with a report and recommendation. (E.R. 1; Appendix D.) The District Court issued an order to show cause re contempt. (E.R. 7.) At the hearing, the parties agreed that the evidence before the court, consisting of the certification from the bankruptcy judge and the return and reply filed by the parties, would constitute the evidence. (E.R. 115-116.)

The District Court found petitioner and his clients in contempt based entirely on these oral findings: (E.R. 131:19 to 133:22.)

"THE COURT: First with respect to respondents' attorney, Mr. Andres Alonso, Jr., I find Mr. Alonso in criminal contempt of court based upon the following findings which I make beyond a reasonable doubt.

"I'm not so concerned so much with all the technicalities back and forth to the November 20th hearing. I think the courts are split as to whether or not the proper mode to attack sufficient notice to a deposition, the validity of a subpoena of a deposition if notice is not given is whether or not necessary to quash or whether or not it's appropriate to refuse to appear and attack it that way. I based the order of contempt on the fact that from my reading of the transcript of November 20th, 1984 indicates to me clearly beyond a reasonable doubt that Mr. Alonso, misled the court that he was agreeing to produce his clients. Further, when Judge Naugle made an order that quote -- after Mr. Alonso objected that first the Court said, 'I am citing you for contempt also.' Mr. Alonso said, 'You did not serve me with any order.'

'THE COURT: You are now served with an order, sir, to produce your clients for deposition forthwith to Mr. Palmer at his office.'

"That's a valid order of this court. Federal Rules of Civil Procedure, Rule 30 recognizes that the court can make an order bearing [sic] the notice requirement under the rule, and so a direct order was made to Mr. Alonso, Mr. Alonso led the court to believe that he was able and would comply with the order, no showing was made that he was unable to comply with the order. In fact, the showing is under the affidavits filed in this case, the deponents did not appear solely on the advise ([sic] of Mr. Alonso. So that, I think, the failure to produce the clients for the deposition when he agreed to produce them --

"The court ordered that the clients be produced for deposition on December 11th and that order was deliberately disobeyed so whether or not the subpoena was valid, whether or not his agreement was conditional, none of that matters because there's a direct disobedience of the order of the court.

"For that reason I find Mr. Alonso in criminal contempt of court. I find also since the matter has not been remedied that he stands in civil contempt of court.

"With respect to the Alexanders, I don't know whether or not the record is sufficient to support a finding of criminal contempt. I think in the interest of justice it

would not be equitable to hold them in criminal contempt because they were acting under the advise [sic] of counsel, and there's nothing in the record that indicates that the Alexanders were not acting in good faith and following the advise [sic] of their attorney. But they still today stand in civil contempt because they did not comply with the order Judge Naugle made on November 20th.

"I'm going to impose sentence forthwith."

D. The Punishment of Petitioner for Criminal and Civil Contempt.

On the criminal contempt, the court sentenced petitioner to pay a fine of $500 and to serve five days in prison. The Court suspended the sentence and placed the petitioner on probation for one year on condition that he produce his clients for deposition within 30 days and that he comply with all discovery rules in the case. (E.R. 139-140.) The court later acknowledged it had improperly imposed

both a fine and imprisonment for a contempt that was not also a criminal offense, and it deleted that portion of the sentence imposing a fine. (E.R. 144-145.) On the civil contempt, the court ordered petitioner to pay $1,500 as partial costs to creditors. As a condition of probation, Mr. Alonso was ordered to produce his clients for deposition within 30 days. (E.R. 140.)

The court ordered the Alexanders to appear for their deposition within 30 days. If they failed to appear, for each day after they would be fined $100. Each of the Alexanders was ordered to pay $250 as partial attorney's fees to Creditors. (E.R. 140-141.) The Alexanders subsequently appeared for their deposition.

E. The Appeal.

Petitioner and the Alexanders appealed the contempt order. (E.R. 146-148.) The

Ninth Circuit Court of Appeals affirmed the District Court's criminal and civil contempt findings against petitioner. (Appendix A.) The appellate court stated:

> "The District Court's finding that Alonso represented to the bankruptcy court that he would produce his clients for deposition, when he had no intention to do so, is not clearly erroneous."

Ironically, the court reversed the civil contempt judgments against petitioner's clients:

> "The record does not indicate that the Alexanders had notice of the bankruptcy court's order made to their attorney, Alonso."

Petitioner thus stands guilty of criminal and civil contempt for failing to have his clients do that which his clients did not have to do.

REASONS FOR GRANTING THE PETITION

I

THIS CASE PRESENTS IMPORTANT AND NOVEL ISSUES REGARDING A FEDERAL COURT'S AUTHORITY TO PUNISH AN ATTORNEY FOR CRIMINAL AND CIVIL CONTEMPT FOR REFUSING TO VIOLATE HIS LEGAL AND ETHICAL OBLIGATIONS TO HIS CLIENTS.

This court recently grappled with the difficult legal and ethical problems facing an attorney torn between his duty to best represent his client and his ethical obligations to the court. (Nix v. Whiteside, ___ U.S. ___, 106 S.Ct. 988 (1986).) The present case presents similarly difficult problems facing an attorney when a court orders him to have his clients do that which he honestly and correctly believes his clients are not required to do.

Petitioner believed that his clients had not been properly subpoenaed for their depositions because the depositions were set and the subpoenas issued in violation of Rules 30(a), 30(b)(1), 30(b)(6), and 45(d)(1) of the Federal Rules of Civil Procedure. Petitioner also relied, in giving his advice to his clients, upon the holdings in the cases of Application of Royal Bank of Canada, supra, 33 F.R.D. 296, 303; and Syrbnik v. Epstein, supra, 13 F.R.D. 248. Yet the bankruptcy court held him in contempt for advising his clients of their rights, and ordered him to produce his clients for the deposition, and then agreed to expunge the contempt but only if petitioner produced his clients for their depositions. When the clients did not appear, petitioner was convicted of criminal and civil contempt. Petitioner was thus trapped between his obligation to advise his clients of their

legal rights and his obligation to carry out a direct order, after being held in contempt. The courts below have effectively required petitioner to abandon his role as advisor to his clients and to become an enforcer of court orders against his own clients.

If for no other reason, certiorari should be granted to draw a clear line for all attorneys practicing in federal courts between professional obligation to a client and legal duty to a court.

II

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE EXPRESS TERMS OF THE CONTEMPT STATUTE, TITLE 18, U.S.C., SECTION 401, AND DECISIONS OF THIS COURT AND OTHER COURTS ON THE PERMISSIBLE SCOPE OF THE CONTEMPT POWER.

A. The Contempt Statute is Expressly and Narrowly Drawn.

Because the power to punish for

criminal contempt is easily abused and was abused in the past (see, Nye v. United States, (1941) 313 U.S. 33, 45-48, 61 S.Ct. 810, 85 L.ED. 1171), Congress has carefully circumscribed the scope of that power in Title 18, U.S.C., Section 401 (emphasis added):

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
>
> "(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> "(2) Misbehavior of any of its officers in their official transactions;
>
> "(3) Disobedience or resistance to its lawlful writ, process, order, rule, decree, or command."

As we now demonstrate, the conduct of petitioner in this case is not and should not be circumscribed by any of these provisions. The language of the statute

and the decisions of this Court and other appellate courts compel that conclusion.

B. An Attorney cannot be required to "Produce" his Clients for a Deposition.

1. Actual Impossibility.

The District Court's finding of contempt was based on petitioner's failure to comply with an oral order of the bankruptcy court on November 20, 1984: (E.R. 51:22-24.)

> "THE COURT: You are now served with an order, sir, to produce your clients for deposition forthwith to Mr. Palmer at his office for deposition."

Inability to comply with a court's order is a complete defense to a contempt charge. (United States v. Rylander, 714 F.2d 996, 1002 (9th Cir. 1983).) Petitioner had no ability to physically produce his clients or anyone else for a deposition. The ability to appear rests in the person

to make the appearance, no one else.

A case in point is Ex Parte Speakman, 257 P. 986 (Ariz. 1927), involving a contempt citation against an attorney who failed to comply with an order to produce persons signing affidavits of prejudice against a judge. The Arizona Supreme Court concluded that the attorney could not be found in contempt because he did not have the ability to comply (257 P. at 988):

> "Regardless of what course the court could or should have pursued, it is very clear that the law did not authorize the procedure it did adopt for the simply reason that the order required the petitioner to produce in court the persons signing the affidavit, and there is no principal of law or rule of court to which he is amenable, making it his duty to perform a service of this character, even upon the direction of the court. It is evident upon its face that the order directed him to do something he could not do in case the affiants' decline to appear upon his mere request, because he had in his own right no authority to bring them in at all hazards -- vi et armis, if necessary -- in violation of their

constitutional rights, and the court had clothed him with no such power. No bench warrant or any other process confronting it was given him, and, if there had been, he would have been under no obligation to serve it. His duties as an officer of the court did not require him to perform the functions of an officer elected or appointed for this purpose."

The Speakman court further explained (257 P. at 988):

"While attorneys are in a sense officers of the court, and as such owe it the duty of maintaining a respectful attitude toward it, of being honest and fair in their dealings with it, and obedient to its rules and proper orders, yet this is the extent to which they are required to go. Given a literal instruction, therefore, it is clear that the order was void, and imposed upon the petitioner no obligation to comply with its terms."

2. Ethical Impossibility.

Even if petitioner had the physical ability to compel his clients to appear for deposition, it is and should be

totally inappropriate for the court to impose such a duty on him. That duty would seriously impair the attorney-client relationship. How could petitioner advise his clients that they had no legal obligation to appear and yet at the same time "produce" his clients for that deposition? As the Court of Appeals recognizes in In Re Dellinger, 461 F.2d 389, 399 (7th Cir. 1972):

> "An attorney has no affirmative obligation to restrain his client under the pain of contempt citation . . . indeed, compelling an attorney to control the conduct of his client under threat of the contempt sanction might well destroy the confidence in the attorney-client relationship which is necessary to a proper and adequate defense."

Moreover, within the meaning of Title 18, U.S.C., Section 401, petitioner was not an "officer" of the court. (Cammer v. United States, 350 U.S. 399, 405, 76 S.Ct. 456, 100 L.ED. 474 (1956).) He

could not and should not be deputized by the court to carry out orders against his own clients.

Petitioner, a member of the California Bar, was constrained by the Rules of Professional Conduct which recognize that an attorney, in the proper discharge of his responsibilities to his client, may question the validity of a court order and advise his client accordingly. Rule 7-101 provides:

> "A member of the State Bar shall not advise the violation of any law or ruling of a tribunal unless he believes in good faith that such law, rule or ruling is invalid. A member of the State Bar may take appropriate steps in good faith to test the validity of any law, rule or ruling of a tribunal."

The California Court of Appeals summarized the broad sense of petitioner's professional duty to his clients in Wolfrich Corp. v. United Services Automobile, Assn., 149 Cal.App.3d 1206, 1211,

197 Cal.Rptr. 446 (1983):

> "Attorneys have a high obligation to represent and protect the interests of their clients zealously, and to that end may properly challenge the validity of any law or decision. [Citations.] . . . . Clients have a right to expect their attorneys to render complete and candid advice. [Citations.] Clients seeking to minimize their losses or maximize potential gains frequently want, and are entitled, to know the precise limits of the laws within which they can act without committing any violation thereof. This is the primary reason why many persons retain attorneys. Consequently, attorneys must be free to fully advise and represent their clients without fear of subjecting themselves to liability as a result of the proper discharge of their professional obligations. Any rule to the contrary would constitute a serious impairment to the attorney-client relationship, and a resulting deleterious effect on the administration of justice. [Citations.]"

This court, too, has emphasized the danger of interfering in the attorney-client relationship by punishing an attorney for good faith advice to his client. As stated in Manness v. Meyers, 419 U.S. 449,

467, 95 S.Ct. 584 (1975):

"There is a crucial distinction between citing a recalcitrant witness for contempt, [citation] and citing the witness's lawyer for contempt based only on advice given in good faith to assert the privilege against self-incrimination. The witness, once advised of the right, can choose for himself whether to risk contempt in order to test the privilege before evidence is produced. That decision is, and should be, the witness', but, if his lawyer may be punished for advice so given there is a geniune risk that a witness exposed to possible self-incrimination will not be advised of his right. Then the witness may be deprived of the opportunity to decide whether or not to assert the privilege.

"An early example of this situation is found in In re Watts, 190 U.S. 1, 23 S.Ct. 718, 47 L.Ed. 933 (1903). There lawyers advised their clients in good faith that state, not federal, court had bankruptcy jurisdiction over a certain property in the hands of a state receiver. This advice led to a collision between the state and federal courts, and contempt citations for the lawyers. Although this Court held that the lawyers' advice was substantively incorrect, it refused to allow the federal contempt conviction stand because there was no evidence the

advice was given in bad faith. [Citation.] Mr. Chief Justice Fuller, speaking for the Court, said:

"'In the ordinary case of advice to clients, if an attorney acts in good faith in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule.' [Citation.]"

An analogous case is In re Tumpson, 345 A.2d 774 (Pa. 1975). In Tumpson, a juvenile was told by a probation officer that the judge had ordered him to appear at a hearing. On the advice of his counsel, the juvenile did not appear. The juvenile court held the attorney in contempt for advising his client to disregard the court's order. The contempt citation was reversed on appeal (345 A.2d at 775, fn. omitted):

"Our review of the record has convinced us that appellant may not be found in contempt. The oral order which appellant allegedly advised his client to disregard was never entered of record, and consequently had no force or effect . . . .

". . . .

"This court has recently stated that the court's power to punish for contempt is limited to situations in which it has both the jurisdiction and the power or authority to render the particular decree or order. [Cititation.] While the court below had the authority to order the juvenile to appear at a hearing in compliance with the Juvenile Act [citation], no valid order was ever entered of record. Consequently the court could not hold appellant in contempt for advising a client to disregard a non-recorded order. [Citation.]"

In the present case, the District Court thus could not hold petitioner in contempt for advising his clients to disregard invalid court subpoenas. Ordering him to produce his clients despite his advice, or coercing a promise to produce his clients despite his advice, are the

same wrongs in a different guise.

C. Petitioner did not Promise to "Produce" his Clients; and even if he did, Breach of such a Promise is not a Contempt of Court.

1. There was no Promise.

The Court of Appeals upheld the District Court's criminal and civil contempt findings against the attorney, concluding as follows (Appendix A):

> "The District Court's finding that Alonso represented to the bankruptcy court that he would produce his clients for deposition, when he had no intention to do so, is not clearly erroneous."

Petitioner submits the only fair reading of the Transcript of the bankruptcy court hearing is that petitioner never agreed or stipulated that he would produce his clients for a deposition. (See, STATEMENT OF THE CASE, Part B, above.) The only consensus was as to the date his clients were available, and that came only

after the court held both petitioner and his clients in contempt of court. Indeed, the bankruptcy court began its colloquy with petitioner by making the appearance of his clients for deposition the decisive factor in whether or not he would be punished for contempt: (E.R. 49:17-20.)

> "THE COURT: The court finds -- let me give you a chance to expunge the contempt. Are you going to produce Mr. and Mrs. Alexander for deposition?

Petitioner made it clear that his clients were not going to voluntarily appear for the deposition: (E.R. 50:24 to 51:6.)

> "THE COURT: So you are not going to produce them now?
>
> "MR. ALONSO: Not today.
>
> "THE COURT: When are you going to produce them?
>
> "MR. ALONSO: When we exhaust our appellate remedies.
>
> "THE COURT: So you are not going to produce them?

"MR. ALONSO: No, until the court rules that Your Honor is correct and we are wrong.

"THE COURT: Okay."

Moreover, contrary to the statement by the Court of Appeals, the District Court did not subsequently find that petitioner misled the bankruptcy judge. While the District Court started out suggesting that as a basis for the contempt finding, the court concluded with its actual findings as follows: (E.R. 133.)

"The court ordered that the client be produced for depositions on December 11th and that order was deliberatingly disobeyed so whether or not the subpoena was valid, whether or not his agreement was conditional, none of that matters because there's a direct disobedience of the order of the court.

"For that reason I find Mr. Alonso in criminal contempt of court. I find also since the matter has not been remedied that he stands in civil contempt of court."

In short, the Court of Appeals

affirmed on the basis of a finding that was never made.

2. Breach of Promise does not Obstruct Justice.

But even assuming that petitioner had promised or agreed to produce his clients, failure to live up to such a promise is no grounds for holding petitioner in criminal contempt. A case in point is Ex Parte Buskirk, 72 F. 14 (4th Cir. 1896) where a contempt citation for violation of a stipulation was nullified. Absent violation of a clear and direct court order, no contempt can be found under federal law. Buskirk states (72 F. at 20):

> ". . . the order first entered sets up the violation of a 'stipulation' made in open court as the foundation of the proceedings for contempt. However reprehensible such conduct on the part of Buskirk may have been, -- proceeding upon the theory that the charge was true, which he, however, denied in his answer, -- it nevertheless did not

> constitute contempt to the court or its orders, and did not authorize any proceedings for contempt under the provisions of the law as it then existed. A careful examination of those records shows that Buskirk had not been ordered to do or decreed not to do any act or thing in said chancery suit prior to the time he was proceeded against, fined, and commited for contempt. Such being the case, the court had no jurisdiction of said contempt proceedings, and the rule should not have been granted."

Since petitioner did not violate an order of the court, and since he was not an officer of the court, the only possible basis for contempt under Title 18, U.S.C., Section 401 is subdivision (1): "Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice."

The failure of petitioner to produce his clients at a deposition as "promised," however, did not constitute such misbehavior. First, the breach of

promise was not in the presence of the court or so near thereto. Second, it did not obstruct the administration of justice. While the deposition of his clients was somewhat delayed, it would have been delayed anyway. As we have shown, there was no valid outstanding subpoena for the deposition of the clients. And, as the Court of Appeals itself found, the clients were never served with an order to appear at the deposition nor with notice that their attorney was to produce them for deposition. Petitioner may have offended the sensibilities of a bankruptcy judge, but he in no way obstructed justice in this case.

In the case at bar, just as in Ex Parte Buskirk, supra, prior to the time that petitioner was held in contempt by the oral ruling of the bankruptcy judge, petitioner, as was Buskirk, had not been

ordered to do or decreed not to do any act or thing in this case. Furthermore, petitioner, as did Buskirk, in his answer, denied in his Objection to Notice of Ruling dated November 29, 1984, that he had stipulated to appear with his clients for their depositions. Petitioner, immediately after receipt of a Notice of Ruling dated November 20, 1984, from counsel for creditors, filed an Objection to Notice of Ruling dated November 29, 1984, which stated, in part:

> ". . . . It was not agreed that in lieu of an order for contempt, the respondents Fred Alexander and Linda Alexander through their attorney, Andres Alonso, Jr., stipulated to appear for a deposition at the law offices of Edward B. DJang.
>
> "Counsel for respondents did not stipulate to appear but rather, advised the court that respondents would not appear for their depositions until all appeal procedures had been exhausted . . . ."

Additionally, as In Re Tumpson, supra, no valid order was ever entered of

record. After petitioner was held in contempt, and then was ordered to "produce" his clients for deposition, the court never signed an order which was entered on record. Instead, the only documents which were entered of record were the Notice of Ruling from the petitioning creditors dated November 20, 1984, and the Objection to Notice of Ruling from petitioner and his clients dated November 29, 1984.

To petitioner's amazement, the petitioning creditors again failed to serve Akros, who was a party to the proceedings, with any written notice whatsoever of the purportedly scheduled depositions of petitioner's clients for December 11, 1984. In short, neither prior to nor after November 20, 1984, did Akros receive from the petitioning creditors a Notice of Taking Depositions directed to Akros, as required

by Rule 30(b)(1) of the Federal Rules of Civil Procedure.

Thus, since on November 20, 1984, 30 days had not lapsed since the time that Akros was finally served with the summons and the involuntary petition, the petitioning creditors had to file a motion, and seek leave of court, in order to obtain an order to take the depositions of petitioner's clients, plus, they had to give notice to Akros. This was exclusively the responsibility of the creditors, and not the court's, as clearly mandated by Rule 30(a) of the Federal Rules of Civil Procedure. Since the foregoing motion was not before the bankruptcy court, and since no notice had been given to Akros, the bankruptcy court could not enter any ruling whatsoever, let alone hold petitioner in contempt, relying, in error, on the fact that the original subpoenas

served on petitioner's clients were valid.

Petitioner contends that absent a motion before the court, the court, on its own, cannot become an advocate in favor of one party and against another. When the bankruptcy court held petitioner and his clients in contempt, and thereafter ordered petitioner to "produce" his clients for deposition, and that if he did, the contempt would be expunged, it was tantamount to the court having become an advocate for the petitioning creditors, and tantamount to ruling that the petitioning creditors did not have to comply with the exact and expressed language of Rule 30(a) of the Federal Rules of Civil Procedure.

It is petitioner's further contention that the bankruptcy court's ruling holding petitioner in contempt on November

20, 1984, relying, in error, on subpoenas which were invalid, was an invalid and unenforceable ruling, in that prior to November 20, 1984, petitioner was under no order to do, or not to do, any act or thing, which petitioner failed to do or not to do.

As stated previously, and as set forth in the entire transcript of the proceedings of November 20, 1984, and admitted by the bankruptcy court, petitioner had not been ordered to do anything, or not to do anything, prior to November 20, 1984, yet, petitioner was held in contempt simply because he had given correct legal advice to his clients, as he was, and is required to do, even though the court did not agree with the petitioner's interpretation of the law which he relied upon in giving his legal advice to his clients. To petitioner's

shock and amazement, he was held in contempt, and was then told that the contempt would be expunged if he "produced" his clients for their depositions. This was, in petitioner's sincere belief, a direct interference by the court, of the attorney-client privilege, since petitioner had told his clients that the subpoenas were invalid. Petitioner then felt, as he had stated on November 20, 1984, that the ruling of November 20, 1984, would be challenged via the appellate process, which petitioner knew would follow, when petitioner elected not to "expunge the contempt." To have done otherwise, would have offended, and would have violated due process of law, and would have interfered with the attorney-client relationship, in petitioner's opinion, because he could not now compel his clients to appear for their

depositions, after already having told his clients that the subpoenas were invalid, for the reasons set forth in this petition.

Petitioner further asserts that the bankruptcy judge was in violation of Rule 30(a) and Rule 30(b)(1) of the Federal Rules of Civil Procedure in that on November 20, 1984, when he held petitioner and his clients in contempt, the court was acting as an advocate, because on November 20, 1984, the court did not have before it a motion seeking to take the depositions of the petitioner's clients. The only motion before the court was to seek to hold petitioner and his clients in contempt based on the fact that the clients did not appear for their depositions, relying on the subpoenas which had been previously served upon the clients, which petitioner considered invalid for

the reaons previously stated.

Rule 30(a) of the Federal Rules of Civil Procedure states, in relevant part, as follows:

> ". . . . Leave of court, granted with or without notice, must (emphasis added) be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon defendant. . . ."

Rule 30(b)(1) of the Federal Rules of Civil Procedure states, in relevant part, as follows:

> "A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. . . ." (Emphasis added.)

In short, petitioner has been punished with a prison term, probation, and monetary sanctions because he did not force his clients to do that which they did not have to do and which was contrary to their best interests, in

his own correct, and honest legal advice to them. Petitioner submits that this conflicts with fundamental notions of due process of law, and is an unfair and irrational basis upon which to unleash the awesome power of criminal contempt by the federal courts.

CONCLUSION

This case invokes multiple grounds why review should be granted. It presents important questions of federal law which, if they have not already been decided by this Court, should be, and to the extent that they have been decided, they have been decided in contrary fashion. The judgment of the Court of Appeals upholds such a significant and unwarranted departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's right to supervise the processes of the federal courts.

The power to punish for contempt is "awesome." (In re LaMarre, 494 F.2d 753, 757 (6th Cir. 1974).) In this case, the exercise of that power was beyond all bounds of reason and threatens the good name of an attorney who was simply doing

the best he could, within the limits of the law, and the demands of his professional responsibilities, for his clients.

Certiorari, therefore, should be granted and the judgment of the Court of Appeals, reversed.

Respectfully submitted,

Law Offices of
ANDRES ALONSO, JR.

By _____
Andres Alonso, Jr.
In Propria Persona

APPENDIX A

APPENDIX A

In re
Akros Installations, Inc.,
a California corporation,
Debtor.
Grand National Bank,
Arrow Precision Products, Inc.,
and Academy Manufacturing,
Petitioners-Appellees,
v.
Fred Alexander, Linda Alexander,
and Andres Alonso, Jr.,
Respondents-Appellants.
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 85-5900
U.S.D.C. No. CV-85-566-AWT
U.S.B.C. No. LA-84-14686-JA/DN
An Appeal from the United States District Court for the Central District of California, Hon. A. Wallace Tashima, Judge Presiding, Argued and Submitted: March 5, 1986, Pasadena, California
Before: Pregerson, Poole, and Thompson, Circuit Judges.
ORDER

We affirm the District Court's criminal and civil contempt findings against Andres Alonso. The District Court's finding that Alonso represented to the bankruptcy court that he would produce his clients for deposition, when he had no intention to do so, is not clearly erroneous.

However, we reverse the civil contempt judgments against his clients, the Alexanders. The record does not indicate that the Alexanders had notice of the bankruptcy court's order made to their attorney, Alonso.

Each party to bear its own costs.

Filed: March 20, 1986

APPENDIX B

APPENDIX B

In re
Akros Installations, Inc.
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
U.S.D.C. No. CV-85-566-AWT
U.S.B.C. No. LA-84-14686-DN
CIVIL MINUTES - GENERAL
Dated: May 6, 1985
Present: Hon. A. Wallace Tashima, Judge
Shelley Keir, Deputy Clerk
Sydney Lawrence,
Court Reporter
Attorneys Present for Plaintiffs:
James H. Palmer
Attorney for Creditors
Attorneys Present for Defendants:
Thomas J. Kelley
Attorney for Debtors:
Fred and Linda Alexander
and for attorney,
Andres Alonso, Jr.
Proceedings:
Continued Hearing on Order to Show Cause in Re Contempt.

All written evidence having been submitted, Court hears arguments from counsel.

Court finds Attorney Alonso in civil and criminal contempt and renders judgment as follows: For the Criminal Contempt: Court orders Alonso to pay fine of $500, to the U.S. Treasury through the Clerk, U.S.

District Court and that Alonso is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five days. Execution of the sentence of imprisonment only is suspended and attorney Alonso is placed on summary probation for a period of one year on the conditions that 1) he produce his clients, the Alexanders, for deposition within 30 days and 2) that he comply with all discovery rules. For the Civil Contempt: Court orders Alonso to personally pay costs in the sum of $1500, and to produce his clients, the Alexanders, for deposition on a date agreeable to counsel within 30 days, or, if no agreement is possible, on 10 days notice by Attorney Palmer. Attorney Alonso is advised of his right to appeal. On Alonso's request, court orders the execution of the Criminal Judgment stayed for 10 days to permit him to

file an appeal.

Court finds Fred and Linda Alexander in civil contempt and orders each of them to pay $250, in attorney's fees and to appear for their depositions within 30 days on a date agreeable to counsel, or, if no agreement, on 10 days notice by Attorney Palmer. Court further orders that an additional $100, per day per person will be assessed for each day they do not appear for their depositions.

APPENDIX C

APPENDIX C

In re
Akros Installations, Inc.,
a California corporation,
Debtor.
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
U.S.D.C. No. CV-85-566-AWT
ORDER PARTIALLY VACATING CONVICTION
AND CORRECTING ILLEGAL SENTENCE
Filed: July 22, 1985

Respondent Andres Alonso, Jr., was convicted of criminal contempt in violation of 18, U.S.C. §§ 401(3) and 402. He was sentenced to pay a fine of $500 and to 5 days' imprisonment, execution of the sentence of imprisonment only was suspended and respondent was placed on summary probation for a period of one year. He has moved for an order correcting the sentence as illegal.

The contumacious act for which respondent was convicted does not independently constitute a criminal

offense. Therefore, it was error to convict him under 18 U.S.C. § 402. Steinert v. United States District Court, 543 F.2d 69, 70 (9th Cir. 1976). The conviction for violation of § 402 is vacated and the reference in the judgment of conviction to "§ 402" is stricken.

Respondent, therefore, stands convicted only of violation of 18 U.S.C. § 401, i.e., reliance by the court on § 402 at sentencing was error. A sentence for violation of § 401 cannot include both fine and imprisonment. In re Osborne, 344 F.2d 611, 616 (9th Cir. 1965). For this reason respondent's motion to correct the sentence is granted.

Respondent represented at the hearing that the fine imposed has not yet been paid.

IT IS ORDERED that the sentence imposed on respondent Andres Alonso, Jr., on May

6, 1985, is corrected by deleting therefrom the portion imposing the payment of a fine to the United States Treasury in the sum of $500.

Dated: July 22, 1985

/s/ A. Wallace Tashima
United States District Judge

I hereby certify that this document was served by first-class mail, postage prepaid, to all counsel (or parties) at their respective most recent address of record in this action on this date.

Dated: July 23, 1985

/s/ V. Beanum
Deputy Clerk

APPENDIX D

APPENDIX D

In re
Akros Installations, Inc.,
a California corporation,
Debtor.
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
U.S.B.C. No. SB(LA)-84-14686-JA/DN
U.S.D.C. No. CV-85-566-AWT
CERTIFICATION TO DISTRICT COURT
(BANKRUPTCY RULE 9020(a)(3))
REPORT AND RECOMMENDATION OF
BANKRUPTCY JUDGE RE: CONTEMPT
Filed: January 24, 1985

To the Honorable United States District Judge to Whom this Matter is Referred:

I. Report of Bankruptcy Judge:

1. The bankruptcy judges of the Central District of California constitute a unit of the United States District Court of this District known as the "bankruptcy court." (28 U.S.C. § 151.) A bankruptcy judge is a judicial officer of the District Court. (28 U.S.C. § 151.)

2. Under Bankruptcy Rule 9020(a)(3), a bankruptcy judge may certify to the

United States District Court the occurrence of criminal contempt when the bankruptcy judge is without power under 28 U.S.C. § 1481 to punish or to impose appropriate punishment for the criminal contempt. This Report and Recommendation constitutes such certification.

3. Section 1481 of 28 U.S.C. was repealed by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333 (Sections 113-114, thereof, repealing, inter alia, Sections 402(b), 405(a) and 405(b) of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2683).

4. Thus, a bankruptcy judge may only certify the facts to a District Judge for appropriate action instead of imposing punishment himself.

5. The contempt in the case at bar constituted "disrespect to or criticism

of" the bankruptcy judge only in the sense that the parties refused to obey orders of the bankruptcy judge and that attorney Andres Alonso, Jr., misrepresented at a hearing that he would produce his clients for depositions. Cf. Bankruptcy Rule 9020(a)(2).

6. A District Judge of the United States District Court may punish individuals who refuse to comply with ordersof the court to obey subpoenas to testify or to provide other information. See, 18 U.S.C. §§ 401, 402, 3151; 28 U.S.C. § 1826; Rules 37(b) and 45(f), F.R.Civ.P.; Rules 17(g) and 42, F.R.Crim.P.

7. On July 17, 1984, petitioning creditors, represented by James H. Palmer, Esq., of the Law Offices of Edward B. Djang, filed an involuntary Chapter 7 bankruptcy petition against Akros Installations, Inc., a California corporation.

8. The involuntary case was referred to Bankruptcy Judge John Ayer and summons was issued and served by mail.

9. Bankruptcy Judge Ayer resigned at the end of August 1984; in September 1984, the case was re-referred by its terminal digit to Bankruptcy Judge David N. Naugle in San Bernardino (hereinafter, "the bankruptcy judge").

10. No timely answer was filed to the involuntary petition; the bankruptcy judge entered an order for relief on September 26, 1984.

11. Also on that date, the bankruptcy judge ordered the filing of requisite schedules and statements by October 15, 1984.

12. Subpoenas for depositions were issued to and duly served on Fred M. Alexander and Linda Alexander, alleged to be current or past officers, directors

and/or shareholders of the corporate involuntary debtor.

13. The Alexanders, through their attorneys, Andres Alonso, Jr., State Bar No. 59076, and Larry M. Hoffman, State Bar No. 63361, have refused to appear for depositions.

14. On November 6, 1984, the bankruptcy judge vacated the order for relief at request of Mr. Alonso on a showing that the service of the summons was subject to a technical defect.

15. Mr. Alonso has moved to have the involuntary petition dismissed and has appealed the bankruptcy judge's order denying that motion.

16. The records of the Secretary of State of California show that Fred M. Alexander was a director and chief executive officer of Akros Installations, Inc., and Linda Alexander was a director

and secretary thereof as recently as August 1984.

17. Mr. Alonso filed an answer to the involuntary petition on behalf of the Debtor, Fred Alexander and Linda Alexander on November 30, 1984.

18. Mr. Alonso represented to the bankruptcy judge on November 6, 1984, that the Alexanders were no longer officers and directors of the Debtor corporation, but refused to disclose who the officers and directors were.

19. On November 20, 1984, the bankruptcy judge heard the petitioning creditors' motion to compel depositions, for sanctions, contempt, etc., and found that the refusal by the Alexanders to appear for their depositions on advice of their attorney, Mr. Alonso, had been contumacious.

20. The bankruptcy judge however gave Mr. Alonso the opportunity to cure the failure and to expunge the contempt by producing the Alexanders for depositions on December 11, 1984; Mr. Alonso agreed to do so.

21. A motion for stay pending appeal of the order denying dismissal was denied on December 10, 1984.

22. Fred M. Alexander and Linda Alexander failed and refused to obey the court's order to appear for depositions on December 11, 1984.

23. On January 16, 1985, the bankruptcy judge heard a new motion for contempt by the petitioning creditors for the willful failure of Fred M. Alexander and Linda Alexander to appear for the depositions set for December 11, 1984.

24. Larry M. Hoffman, State Bar No. 63361, appeared for the Law Offices of

Andres Alonso, Jr., on behalf of the Alexanders. Mr. Hoffman refused to produce the Alexanders for depositions.

25. The District Court clerk's office reports by telephone that Mr. Alonso was admitted to the Bar of this District on July 18, 1974.

26. The District Court clerk's office reports by telephone that it has no record of the admission of Larry M. Hoffman, State Bar No. 63361.

27. The range of sanctions for discovery abuse and contempt available to the bankruptcy judge is limited to compensatory monetary sanctions, including costs and attorneys fees, and/or striking the answer and entering an order for relief.

28. The bankruptcy judge has imposed no punishment on the Debtor, the Alexanders, and the two attorneys (Mr. Alonso and Mr.

Hoffman) although all of the individuals have been found in contempt for failure to obey the subpoenas to appear, for violation of the bankruptcy judge's order in open court to Mr. Alonso to produce the Alexanders for depositions on December 11, 1984 (to which Mr. Alonso agreed), and for continuing obstreperous and recalcitrant refusal to appear for depositions.

29. Concealment or transfer of assets in a bankruptcy case context can be a crime (18 U.S.C. § 152).

II. Recommendations of Bankruptcy Judge

A. That Fred Alexander and Linda Alexander be summarily ordered confined at a suitable place until such time as they are willing to give testimony and provide information.

B. That Andres Alonso, Jr., a member of the Bar of this Court, be punished by an appropriate fine and/or

imprisonment and be considered for disbarment or suspension for misconduct.

C. That Larry M. Hoffman, who appears not to be a member of the Bar of this Court, be punished by an appropriate fine for his conduct, be required to prove his membership in this Court's Bar prior to his first appearance in this case (December 10, 1984), failing which he should be required to pay his membership fee and an appropriate fine for unauthorized appearance.

D. That the District Judge impose appropriate monetary or other sanctions in favor of the petitioning creditors and their attorney, including attorneys fees and striking of the answer to the involuntary petition and entry of an order for relief, or return this aspect of the matter to the bankruptcy judge with directions to take no action, discretionary

action, or directed action in regards thereto.

Respectfully certified this
18th day of January 1985:

/s/ David N. Naugle
Bankruptcy Judge